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# CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

## Report of the Secretary-General

## Addendum

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# CHINA

[Original: Chinese]

[16 July 1992]

1. The question of jurisdictional immunities of States and their property is a vital question of international theory and practice. After years of continued efforts, the International Law Commission of the United Nations finally adopted, on second reading, the draft articles on jurisdictional immunities of States and their property (hereinafter referred to as "the draft articles") at its forty-third session, in 1991. The Chinese Government pays tribute to the International Law Commission, especially to its two Special Rapporteurs, for the outstanding work they have done in this respect. It supports the convening of an international conference on this subject for the purpose of negotiating and concluding a convention on jurisdictional immunities of States and their property.

2. Before making specific comments on the text of the draft articles, the Chinese Government wishes to point out that the jurisdictional immunities enjoyed by States and their property constitute a long-established principle of international law which is widely recognized among States. It has its fundamental legal basis in the principle of State sovereignty and equality of sovereignty and the principle of par in parem non habet jurisdictionem. We believe, therefore, that the purpose of establishing a legal regime on jurisdictional immunities of States and their property should be to reaffirm and strengthen the international legal principles concerning jurisdictional immunities of States and, on this basis, taking into account the differences between States as to their social, economic and legal systems and proceeding from the actual need of contemporary intercourse of States, to provide for certain exceptions to which the principle of State immunities cannot be applied, in order to strike a necessary balance between the reduction and prevention by a sovereign State of abuses of its internal judicial proceedings and the provision of fair and just means for settling disputes, thus contributing to the development of international economic and commercial exchanges and cooperation and the promotion of friendly relations between States. In the light of the above, we believe that the draft articles, first of all, affirm the jurisdictional immunities of States and their property as a general principle of international law while taking into account the actual need for conducting and strengthening international intercourse. They also provide, on the premise of the consent of States, for certain exceptions to the applicability of this principle, thus safeguarding the established principles of international law in this domain, while reflecting more fully the realities of the development of contemporary international relations. Taken as a whole, then, the draft articles are acceptable.

3. It should be noted in particular that the definition of "State" in article 2 excludes entities established by the State which are capable of exercising civil responsibilities and have the right to occupy and dispose of

its property and engage in business transactions. In addition, article 10, paragraph 3, makes a clear distinction between the legal position of a State and that of a State enterprise with regard to the question of jurisdictional immunities. In the opinion of the Chinese Government, these two articles have great significance. They will help prevent cases of abuse of judicial proceedings by a State against the State of nationality of the enterprise concerned, thus contributing to the normal development of international relations. For this reason, the said provisions of these two articles are of utmost importance to the draft articles.

4. For more effective realization of the purposes of the draft articles, the Chinese Government believes that certain provisions of the draft articles must be further improved; accordingly, it proposes the following specific revisions:

(a) With regard to article 2, paragraph 1 (b), since the question of whether the constituent units of a federal State represent the State is a matter of internal law, and since the national legislation and practice of different States in this respect vary, we propose that this item be deleted;

(b) With regard to the title of Part III, since immunities of States constitute a basic principle of international law founded on State sovereignty and the equality of sovereignty, we believe that it would be better and closer to reality if the title retained the words "exceptions to";

(c) With regard to the disputes mentioned in articles 11 and 12, since such disputes can also be settled by mutual agreement between the States concerned or through diplomatic channels or by means of insurance, we propose the deletion of these two articles;

(d) With regard to article 20, to facilitate the determination of the "day of service of process", we propose that paragraph 2 of this article be amended to read: "Service process referred to in paragraph 1 (b) is deemed to have been effected on the day the State concerned issues a diplomatic note acknowledging the receipt of the process."

## GERMANY

[Original: English]

[14 August 1992]

1. Germany, in principle, supports the idea of convening a conference of States with the aim of adopting the envisioned convention on State immunity. The draft articles adopted by the International Law Commission form a good basis for consideration. The German Government, however, has noted considerable concern during the debates in the Sixth Committee in regard of certain provisions. Furthermore, State practice in this field still reveals a number of regional differences.

2. Bearing in mind the importance of the subject and the work done so far by the International Law Commission, the German Government holds the view that an attempt to adopt a universal convention at a conference of States should only be made if the final text is acceptable to all and finds broad support. Germany, therefore, welcomes the establishment of a working group of the Sixth Committee as provided in General Assembly resolution 46/55 of 9 December 1991 and is ready to participate in its work. The working group should consider issues that are still controversial as well as the procedural questions regarding the adoption of a convention. It should also be prepared to take note of draft documents on the subject that have been prepared by other institutions.

3. The German Government is of the opinion that the following matters, among others, should be reconsidered during such talks.

4. One of the key issues for the whole concept of jurisdictional immunities is the question of finding workable criteria to distinguish between those activities of a State which should not be covered by immunity because of their private law character and those activities which are to be considered as an exercise of sovereign authority and thus as giving rise to immunity from adjudication by foreign courts.

5. According to article 2, paragraph 2, as it stands today, the commercial character of a transaction would be determined in a two-step approach. The nature of the transaction would be the principal determinant; however, if the nature test is not entirely conclusive, a secondary test would take the purpose of the transaction into account. Germany has always advocated - and continues to advocate - that only the legal nature of the transaction should be the deciding factor. As the purpose of a transaction is often not recognizable at the time of the agreement unless it is laid open, claiming a non-commercial purpose when it comes to judicial review will thus often be tantamount to depriving a private party of any means to seek judicial redress.

6. Even under the present system, where it is up to the forum State's court to decide whether a non-commercial purpose gives rise to immunity, an uncertainty remains: in determining the purpose, the court would ultimately have to rely on information provided by the Government invoking immunity.

7. As to article 10, Germany has no difficulty with the principle that a State enterprise with an independent legal personality engaged in a commercial transaction should be treated like any other private person in this field and that the question of immunity remains unaffected. The problem behind this rule, however, is a question of liability. Germany has already pointed out that this provision would enable a State secretly to avoid any liability risk by setting up such independent entities without providing sufficient capital. Consequently, when it comes to execution, a private party might find that there is no property to be seized although the enterprise is clearly run by the parent State. It seems that where a State enterprise engages in commercial activities, at least the (liable) capital should be made transparent in order to allow a party to the contract to assess in advance the risk involved in trading with such an entity.

8. Debates in the Sixth Committee concerning article 18 have also revealed concern by a number of States about the inclusion in one provision of both pre- and post-judgement measures. Taking into account the differences existing between various national enforcement systems, the problem with article 18 seems to be more than a terminological issue. The problem should be carefully reconsidered before adoption in order to make the final text acceptable for all States.

9. The provision in article 18, paragraph 1 (c), that measures of constraint would be taken only against property that has - in addition to two other elements - a "connection" with the claim which is its object seems to limit unnecessarily the cases where property may legitimately be seized. Furthermore, the kind of "connection" required is not entirely clear. Germany had welcomed the proposal made earlier by the Special Rapporteur to delete this part of the sentence. The Special Rapporteur's proposal should be reconsidered before adoption of the text.

10. Article 19, paragraph 1 (a), reflects the principle established in State practice that no measures of constraint may be taken against State property for use of diplomatic and other missions in the forum State. The commentary rightly acknowledges, however, that certain property - for example, bank accounts held by an embassy - may be maintained for commercial purposes only and thus does not fall under the notion of property used for the State's diplomatic function. When it comes to deciding whether or not a bank account belongs to either of the two categories, the question of standard of proof comes into play. As far as property used for the maintenance of the respective diplomatic mission is concerned, a general declaration by the State, possibly in the form of a certificate, will suffice. However, neither article 18 nor the commentary indicate how the question of proof is to be handled by the court where other property is concerned.

11. The rule laid down in article 22, paragraph 2, that a State would be exempt from providing any security, even when acting as plaintiff, accords an unwarranted privilege to States and is therefore not acceptable. In practice, the defendant will in many cases find it difficult to obtain reimbursement of the costs incurred in the proceedings. In any given case, the situation is thus unbalanced and unfair from the very beginning. Whereas the plaintiff State can institute proceedings practically free of risk, even the successful defendant may eventually face considerable loss. For the German Government, it seems to be a matter of fairness to say that where a State has demonstrated its intention to seek judicial redress before a forum court, making use of its procedure like any other private person, it should be treated like any other person and be subject to the procedural regulations which are applicable to all. The original proposal by the Special Rapporteur to amend paragraph 2 so as to require at least the plaintiff State to provide security went in the same direction.

12. As to the problem of the settlement of disputes concerning the interpretation or application of the envisioned text, Germany recalls the fact that the European Convention on State Immunity of 1972, in an additional

protocol, contains an elaborate system of this kind. Taking into account the subject of this draft convention, the German Government wonders whether the draft proposal is complete without any provision in this sense.

## TURKEY

[Original: English]

[9 July 1992]

1. Article 11 entitled "Contracts of employment" does not take account of the nature of administrative contracts in connection with immunity from jurisdiction. Admittedly, paragraph 2 of the article recognizes the possibility of invoking immunity from jurisdiction in cases where the employee has been recruited to perform functions closely related to the exercise of governmental authority. However, that provision is not sufficient to cover all categories of administrative contracts which should benefit from immunity.

2. The clause "discharge from employment" should be added to paragraph 2 (b) of article 11 of the draft articles.

3. According to article 10, paragraph 1, the State engaging in a commercial transaction with a person, natural or juridical, other than its own national, cannot invoke immunity from the exercise of jurisdiction by the judicial authority of another State where that judicial authority is competent to exercise its jurisdiction by virtue of its applicable rules of private international law.

4. Turkey does not favour the suggestion to include into the draft a clause establishing a jurisdictional link between a commercial transaction and a forum State. Such a clause could create difficulties in determining which country's internal law would be the basis of the linkage to be done. The existence of such a clause would also impede the finding of a solution in case of the involvement of more than one State.

5. Furthermore, during the discussions of article 16 entitled "Ships owned or operated by a State", a query was submitted as to whether the expression "ships" could be understood to include "aircraft" as well as seagoing vessels. Turkey's interpretation on this issue is to limit the term "ships" to "seagoing vessels". This interpretation is in line with the commentary on the draft articles.

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